Chai Tee Keiong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–301–11 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
31 JULY 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged with trafficking in dangerous drugs — Accused sentenced to death — Whether defence cast reasonable doubt against prosecution case — Whether defence sufficiently considered by trial judge — Whether trial judge erred in decision — Dangerous Drugs Act 1952 s 39B(1)(a)

D

Evidence — Agent provocateur — Admissibility of evidence — Agent provocateur member of public — Agent provocateur agreed to play role to avoid being detained by police station for drug offence — Appointed to secure information on drug trafficking by accused — Whether there was legal impediment for agent provocateur to be appointed by police — Whether 'spying job' done for financial gain — Whether agent provocateur's evidence should be accepted

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The appellant was charged in the High Court for trafficking in 494.81g drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). SP3, a member of the public, acted as agent provocateur to secure information about drug trafficking activity of one Ah Ken. Acting as a purchaser, SP3 contacted the appellant and requested for 1kg of heroin. The appellant replied in positive and agreed to supply the heroin at the price of RM9,500. A few days later, the appellant contacted SP3 to inform him that the drugs had arrived and the two arranged a meeting. On the same day, SP3 arrived at appellant's house. The appellant handed SP3 the drugs and the latter handed the former a cheque in the sum of RM9,500. SP3 left the appellant's house and informed the police ('SP4') that the appellant had kept the drugs in the boot of a car. SP4 and his police personnel proceeded to the appellant's house and arrested the appellant. A body search revealed keys to the said car. Using the seized keys, SP4 gained access to the car and on the rear seat, a plastic bag and a handphone box was found containing substances which was later confirmed by the chemist ('SP2') to be 494.81g of dangerous drugs comprising 430.98g of heroin and 63.83g of monoacetymorphines. In his defence, the appellant averred that SP3 was the real trafficker as the latter was the one who handed over the package containing the substance to the appellant and requested him to repack it. The appellant denied knowledge at all about the substance and his only concern was to help SP3 to repack the substance and place it inside the motorcar. The appellant also

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denied receiving cheques from SP3 as payment for the purchase of the drugs but instead averred that the cheques were meant as repayment of debt owed by the latter to the former. At the end of the trial, the appellant was found guilty, convicted of the offence and sentenced to death. In the present appeal, the issues raised were on serious doubts of the identity of the drug exhibit; whether SP3 as the agent provocateur was worthy of credit; whether the appellant's defence was sufficiently appreciated by the High Court judge.

Held, allowing the appeal:

(1) The discrepancy in the gross weight of the drug between the evidence of SP2 and the investigating officer ('SP7') were left unexplained. SP7 did not say that the weight was an estimated weight. SP7's evidence was quite categorical when he testified that the weight of the heroin was 770g. A break or a gap in the chain of evidence was a perennial problem for the prosecution. While it showed that the prosecution witnesses were telling the truth, the defence took advantage of it and used it in their favour. The only way to overcome this undue advantage was for the prosecution to advance a reasonable explanation for the break or the gap in the chain of evidence. However, the non-explanation by the prosecution as to the doubts or discrepancies as to the exhibits be it in regard to their weights, description, packagings or markings must be construed as fatal (see paras 23–24).

(2) SP3 was not a police officer or a customs officer. He was a member of the public and, in the context of the present case, acted as an agent provocateur. There was no legal impediment for SP3 to be appointed by SP4 as an agent provocateur. The evidence adduced showed that SP3 not only did the spying job to secure evidence against the appellant but he also did it for financial gain. To compound the matter further, SP3 also acted as an agent provocateur to avoid being detained at the police station for a drug offence. The evidence of an agent provocateur in the person of SP3 and the defence was merely adducing sufficient evidence by way of cross-examination of SP3 in order to establish the defence case and at the same time, to discredit SP3 and label SP3 not as a credit worthy witness bearing in mind that s 40A(1) of the DDA was rebuttable (see paras 26, 31–32 & 43).

(3) There were several aspects of the appellant's defence which were corroborated by the evidence adduced by the prosecution which were not considered by the High Court judge. Firstly, the defence was that it was SP3 who was the trafficker. A serious defence was put up by the appellant. It was a bounden duty of the High Court judge to consider the defence together with the cautioned statement of the appellant. But this was not done. There was no judicial appreciation of the defence case. It was a classic case of non-direction by the High Court judge unto himself. Yet,

the High Court judge labeled the defence of the appellant as a 'bare denial' and as an 'afterthought' (see paras 56–57). A

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi kerana mengedar 494.81g dadah, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). SP3, seorang awam, telah bertindak sebagai ejen perangkap untuk mendapat maklumat tentang aktiviti pengedaran dadah oleh Ah Ken. Bertindak sebagai pembeli, SP3 telah menghubungi tertuduh dan meminta 1kg heroin. Perayu menjawab secara positif dan bersetuju untuk membekalkan heroin pada harga RM9,500. Beberapa hari kemudian, perayu menghubungi SP3 untuk memberitahu dia bahawa dadah telah tiba dan kedua-dua mereka mengatur satu mesyuarat. Pada hari yang sama, SP3 tiba di rumah perayu. Perayu telah menyerahkan dadah itu kepada SP3 dan SP3 telah menyerahkan perayu cek berjumlah RM9,500. SP3 telah meninggalkan rumah perayu dan memberitahu polis ('SP4') bahawa perayu telah menyimpan dadah itu di dalam but kereta. SP4 dan anggota polisnya menuju ke rumah perayu dan menangkap perayu. Kunci kereta tersebut ditemui dalam carian badan ke atasnya. Dengan menggunakan kunci yang dirampas itu, SP4 dapat masuk ke dalam kereta itu dan di tempat duduk belakang, beg plastik dan kotak telefon bimbit telah ditemui yang mengandungi bahan-bahan yang telah disahkan oleh ahli kimia ('SP2') sebagai 494.81g dadah berbahaya yang terdiri daripada 430.98g heroin dan 63.83g monoacetymorphines. Dalam pembelaannya, perayu menegaskan bahawa SP3 adalah pengedar sebenar kerana pengedar adalah orang yang telah menyerahkan bungkusan yang mengandungi bahan itu kepada perayu dan meminta dia untuk membungkusnya semula. Perayu menafikan langsung mempunyai pengetahuan tentang bahan itu dan dia hanya ingin membantu SP3 untuk membungkus semula bahan itu dan meletakkannya ke dalam kereta tersebut. Perayu juga menafikan telah menerima cek daripada SP3 sebagai bayaran untuk pembelian dadah itu tetapi sebaliknya menegaskan bahawa cek-cek tersebut telah dimaksudkan sebagai pembayaran balik hutang yang terhutang oleh SP3 kepadanya. Pada akhir perbicaraan itu, perayu didapati bersalah, disabitkan atas kesalahan itu dan dihukum mati. Dalam rayuan ini, isu yang dibangkitkan adalah tentang keraguan yang serius identiti behubung ekshibit dadah itu; sama ada SP3 sebagai ejen perangkap itu boleh dipercayai; sama ada pembelaan perayu mencukupi untuk pertimbangan hakim Mahkamah Tinggi. B C D E F G H

Diputuskan, membenarkan rayuan:

(1) Perbezaan berat kasar dadah itu dalam keterangan SP2 dan pegawai penyiasat ('SP7') tidak dapat dijelaskan. SP7 tidak mengatakan bahawa berat badan adalah berat yang dianggarkan. Bukti SP7 agak mutlak apabila dia memberi keterangan bahawa berat heroin itu adalah 770g. Rantaian bukti yang terputus atau mempunyai lompang merupakan I

masalah yang tidak berkesudahan untuk pihak pendakwaan. Walaupun ia menunjukkan bahawa saksi pendakwaan telah bercakap benar, piahk pembelaan mengambil kesempatan daripada itu dan menggunakannya untuk memihak kepada mereka. Satu-satunya cara untuk mengatasi kelebihan yang tidak wajar ini adalah bagi pihak pendakwaan mengemukakan penjelasan munasabah bagi rantaian bukti yang terputus atau mempunyai lompang itu. Walau bagaimanapun, pihak pendakwaan yang tidak memberikan penjelasan untuk keraguan atau percanggahan tentang ekshibit-ekshibit itu sama ada berkenaan dengan berat, deskripsi, pembungkusan atau tanda hendaklah ditafsirkan sebagai suatu yang memudaratkan (lihat perenggan 23–24).

(2) SP3 bukan pegawai polis atau pegawai kastam. Dia adalah orang awam dan, dalam konteks kes ini, bertindak sebagai seorang ejen perangkap. Tidak ada halangan undang-undang untuk SP3 yang dilantik oleh SP4 sebagai seorang ejen perangkap. Bukti yang dikemukakan menunjukkan bahawa SP3 bukan hanya melakukan kerja mengintip untuk mendapatkan keterangan terhadap perayu tetapi dia juga melakukannya untuk keuntungan kewangan. Untuk mengukuhkan perkara itu lagi, SP3 juga bertindak sebagai seorang ejen untuk mengelak daripada ditahan di balai polis kerana kesalahan dadah. Keterangan seorang ejen perangkap sebagai SP3 dan pembelaannya itu adalah hanya untuk mengemukakan keterangan yang mencukupi melalui pemeriksaan balas SP3 untuk mewujudkan kes pembelaan dan pada masa yang sama, untuk memburukkan SP3 dan melabel SP3 sebagai saksi yag tidak boleh dipercayai dengan mengambil kira s 40A(1) ADB boleh dipatahkan (lihat perenggan 26, 31–32 & 43).

(3) Terdapat beberapa aspek pembelaan perayu yang disokong dengan keterangan yang dikemukakan oleh pihak pendakwaan yang tidak dipertimbangkan oleh hakim Mahkamah Tinggi. Pertama, pembelaan di mana SP3 adalah pengedar dadah tersebut. Pembelaan serius telah dikemukakan oleh perayu. Ia suatu yang perlu ditentukan oleh hakim Mahkamah Tinggi untuk mempertimbangkan pembelaan itu bersama dengan penyataan beramaran perayu. Namun, ini tidak dilakukan. Tidak ada penghargaan kehakiman kes pembelaan. Ia adalah satu kes klasik bukan arah oleh Hakim Mahkamah Tinggi kepada dirinya sendiri. Namun, hakim Mahkamah Tinggi melabelkan pembelaan perayu sebagai 'penafian kosong' dan sebagai 'suatu yang telah difikirkan kemudian' (lihat perenggan 56–57).]

Notes

For cases on admissibility of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 379–383.

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] CLJ (Rep) 241, SC (refd)
AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)
Allied Pastoral Holdings Pty Ltd v Comr of Taxation [1983] 1 NSWLR 1, SC (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)
Balasingham v PP [1959] 1 MLJ 193 (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, FC (refd)
Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 27 1135, SC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Hari Bhadur Ghale v PP [2012] 6 MLJ 597; [2012] 7 CLJ 789, FC (refd)
Kumaraguru a/l N Muniandy & Ors v PP [1994] 1 MLJ 254, HC (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322; [1992] 1 CLJ (Rep) 168, SC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
PP v Lee Hock Lai [2004] 1 CLJ 57, HC (refd)
PP v Sivakumar Ammasi [2003] MLJU 39; [2003] 6 CLJ 152, HC (refd)
PP v Tan Hock Beng [2002] MLJU 75; [2002] 3 CLJ 177, HC (refd)
Pa v One v Public Prosecutor (No 2) [1986] 1 MLJ 423 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Liew Oon Kiong [1991] 3 CLJ (Rep) 593, HC (refd)
PP v Lim Bong Kat & Anor [1992] 3 CLJ (Rep) 380 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Padi bin Abdullah [1989] 2 MLJ 60, HC (refd)
PP v Poh Ah Kwang [2003] MLJU 142; [2003] 3 AMR 664, HC (refd)
PP v Saare Hama & Anor [2001] 4 MLJ 480; [2001] 4 CLJ 475, HC (refd)
PP v Saw Kok Leong [1993] MLJU 234; [1993] 4 CLJ 83, HC (refd)
PP v Sulaiman bin Mohamad Noor [1996] 1 MLJ 196, HC (refd)
R v Emmanuel [1998] Crim LR 347, CA (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559; [2004] 1 CLJ 521, FC (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)
Tee Thian See v Pendakwa Raya [1996] 3 MLJ 209, HC (refd)

A *Wan Mohd Azman bin Hassan @ Wan Ali v PP* [2010] 4 MLJ 141; [2010] 2 AMR 834, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yeong Kia Heng lwn Pendakwa Raya [1992] 1 MLJ 327; [1992] 1 CLJ 364, SC (refd)
B *Yusri bin Pialmi v PP* [2011] 4 MLJ 533; [2010] 6 CLJ 878, FC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (refd)

Legislation referred to

C Dangerous Drugs Act 1952 ss 40A, 40A(1), First Schedule

Appeal from: Criminal Trial No MTJ(1)45A-21 of 2010 (High Court, Johor Bahru)

D *Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.*
Diar Isda Yazmin Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering the judgment of the court):

E INTRODUCTION

[1] The appellant was charged in the Johor Bahru High Court with the following charge:

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> Bahawa kamu pada 25 Januari 2010 jam lebih kurang 2.20 petang di hadapan rumah No: 63, Kampung Lukut Cina, dalam daerah Kota Tinggi, dalam negeri Johor Darul Takzim telah memperedarkan dadah berbahaya seberat 494.81 gram (heroin seberat 430.98 gram dan monoacetylmorphines seberat 63.83 gram) dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[2] After a full trial, the appellant was found guilty and was convicted and
H sentenced to death for trafficking in the dangerous drugs as per the charge by the Johor Bahru High Court. Aggrieved, the appellant now appeals to this court.

THE CASE FOR THE PROSECUTION

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[3] ASP Mohd Hadzir bin Che Pa ('SP4') enlisted the help of his agent provocateur by the name of Chong Kai Jack ('SP3'), also known affectionately as 'Ah Boi', to secure information about a drug trafficking activity of a male Chinese known as 'Ah Ken' in the area of Kg Lukut Cina at Kota Tinggi and at

the same time, to act as a buyer. SP3 knew that 'Ah Ken' referred to the appellant and that the appellant ran a prostitute den and SP3 used to frequent the appellant's house to seek the services of the prostitutes there.

[4] In due course, SP3 acting as a purchaser, contacted the appellant via handphone number 0143118168 and enquired as to whether the appellant had 1kg of heroin and the price for that amount. The appellant replied in the positive and agreed to supply the drugs, namely, heroin, at the initial price of RM11,000 per kg. SP3 bargained for a discount and the appellant agreed to reduce the price to RM9,500. SP3 sought for time to consider the offer. Without further ado, SP3 contacted SP4 and briefed the latter as to what had transpired. SP4 directed SP3 to purchase the heroin from the appellant.

[5] Meanwhile, the appellant also asked for time, one to two days, to obtain the drugs from the appellant's friend and the appellant also requested SP3 for some deposit money. SP3 borrowed two cheques from his friend by the name of 'Ah Siong' and by way of a consideration of the agreement with the appellant, SP3 wrote and signed a Maybank cheque for the sum of RM3,000 and handed it to the appellant at the appellant's house at Lukut Cina as a deposit. SP3 knew that the Maybank cheque for RM3,000 which he handed to the appellant was worthless. In the words of SP3, that cheque 'tidak boleh dipakai' (see p 43 of the appeal record).

[6] A few days later, the appellant contacted SP3 via handphone and told SP3 that the heroin had arrived and the appellant wanted to give the heroin to SP3 at a certain spot. SP3, however, responded that he would collect the heroin at the appellant's house. The appellant agreed to SP3's proposition. And before SP3 proceeded to the appellant's house, SP3 informed SP4 about the whole matter. SP4 then directed SP3 to proceed to the appellant's house.

[7] On the same day at about 2pm to 3pm, SP3 arrived at the appellant's house. On arrival, SP3 saw the appellant assisted by an Indonesian woman were packing the drugs and putting it in a Nokia bag and then placing it in a Maxis plastic bag. At the same time, the appellant told SP3 that the drugs were less than 1kg. SP3 responded by saying that as the drugs were less than 1kg, SP3 would not take it yet and would only take from the appellant if the drugs were 1kg. The appellant retorted that it was alright and SP3 saw the appellant kept the Maxis plastic bag containing the drugs in the boot of a white coloured Proton Iswara. SP3 then took back the Maybank cheque for the sum of RM3,000 which was earlier given to the appellant as deposit and SP3 replaced it with another Maybank cheque for the sum of RM9,500 (exh 'P7A'). Soon thereafter, SP3 left the appellant's house and informed SP4 that the appellant had kept the drugs in the boot of the white coloured Proton Iswara bearing registration no WJG 7730.

[8] On 25 January 2010 at about 2.10pm, SP4 and his police personnel proceeded to the house where the appellant was staying and kept vigil. About 10 minutes later, SP4 saw a blue coloured Proton motorcar arrived and parked outside the appellant's house at an address as per the charge. SP4 saw a male Malay coming out of the said blue coloured Proton motorcar and went inside the appellant's house. At that juncture, SP4 gave a signal to his police personnel to raid the appellant's house. SP4 swung into action and approached the grille door to the said house and saw a male Chinese attempted to flee. SP4 indentified himself and shouted for the grille door to be opened. A male Chinese opened the grille door which allowed SP4 and his police personnel to gain entry into the premises. Once inside, SP4 noticed that there were altogether six occupants in the said house comprising of four males and two females. The appellant was then placed under arrest. SP4 did a body search on the appellant and found keys to a motorcar. Using the keys seized from the appellant, SP4 gained access to a white coloured Proton Iswara motorcar bearing registration No WJG 7730 which was parked within the vicinity of the appellant's house. Inside the said motorcar, on the rear seat, SP4 found a plastic bag and a handphone box (exh 'P6B'). Inside exh 'P6B', SP4 found a plastic package (exh 'P5A') containing substances which was later confirmed by the government chemist Pn Norashidah bt Omar ('SP2') to contain 494.81g of dangerous drugs comprising of 430.98g of heroin and 63.83g of monoacetymorphines. According to SP2, heroin and monoacetymorphines are dangerous drugs as listed in the First Schedule to the Dangerous Drugs Act 1952 ('DDA').

THE DEFENCE OF THE APPELLANT

[9] The nub of the appellant's defence was that it was SP3 who was the real trafficker. That it was SP3 who handed over the package containing the substance to the appellant and requested the appellant to repack it. And the appellant repacked it with the help of an Indonesian woman by the name of Ina (in the appellant's cautioned statement marked as exh 'D21', the appellant named the Indonesian woman as 'Farhana'). That the appellant had no knowledge at all about the substance and that his only concern was to help SP3 to repack the substance and placed it inside the motorcar. All these were done at the behest of SP3.

[10] The appellant denied receiving the cheques from SP3 as payment for the purchase of the drugs. On the contrary, it was the appellant's defence that the cheques were meant as repayment of the debt owed by SP3 to the appellant. In fact, under cross-examination, SP3 confirmed the version of the appellant when SP3 admitted that in January 2010, SP3 was indebted to the appellant to the tune of approximately RM12,000.

[11] According to the appellant, if the appellant knew that the package handed by SP3 to him contained drugs, the appellant would not have repacked the package. The appellant knew SP3 as a customer who visited the appellant's prostitute's den at least two to three times per month. So the appellant least expected that the package contained drugs. At p 90 of the appeal record, the appellant categorically stated that he did not know that the package contained drugs. The exchange went like this:

> Soalan : Adakah kamu tahu pada masa itu, bungkusan itu adalah dadah?
>
> Jawab : Saya tidak tahu.

THE ANALYSIS

[12] Before us three main issues were raised, namely:

(a) that there were serious doubts in regard to the identity of the drug exhibit;

(b) that SP3 as the agent provocateur was unworthy of credit and his evidence should be disregarded; and

(c) that the appellant's defence was not appreciated by the High Court judge.

[13] These three issues will now be separatedly considered.

THE FIRST ISSUE

[14] It was argued that there was a serious doubt in regard to the identity of the drug exhibit. The doubt arose as a result of the discrepancy in the gross weight of the drug in question. At p 38 of the appeal record, SP2 testified that the gross weight was 779.33g. And this was what SP2 said in her testimony during cross-examination:

> Soalan : Berkenaan dengan paket plastik tandaan H1, sebenarnya apakah berat kasar?
>
> Jawab : Berat kasar bagi H1 ialah 779.33 gram.

[15] The investigating officer by the name of Inspector Cairun Niza bt Mohamad Hashim ('SP7') testified that the gross weight was 770g and the discrepancy with the evidence of SP2 came up to 9.33g. At p 73 of the appeal record, SP7 testified as follows in his examination-in-chief:

Dalam tangkapan itu, libatkan penemuan dadah dalam 770 gram heroin.

[16] The discrepancy, according to Mr Hisyam Teh Poh Teik, showed that by the time the drug exhibit reached the hands of SP2 — the government chemist, the weight had gone up and this was to the disadvantage of the appellant. The discrepancy was not explained by the prosecution and it was emphasised that such an omission must be construed as fatal. On the same issue, Arifin Zakaria CJ in *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383(FC), held that the discrepancies that were left unexplained created a reasonable doubt as to the identity of the drug exhibit and the defence should not have been called at the close of the prosecution's case and it was not safe to uphold the appellants' convictions.

[17] In *Yeong Kia Heng lwn Pendakwa Raya* [1992] 1 MLJ 327; [1992] 1 CLJ 364 (SC), Gunn Chit Tuan SCJ writing for the Supreme Court held that the discrepancies as to the weight of the drug exhibit impinged on the prosecution's case and the defence should not have been called. The appeal was allowed and the conviction was also quashed.

[18] In *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212; [2009] 4 CLJ 245 (FC), Zulkefli Makinuddin FCJ (now Chief Judge Malaya) writing for the Federal Court held that the appellant succeeded in showing that the discrepancy in the nett weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. That being the case, the prosecution failed to prove the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt had been created as to whether the cannabis recovered by the police that was sent to the chemist for analysis was the same substance that was found to be cannabis in respect of which the appellant was charged for trafficking. On this ground alone, the appellant succeeded in his appeal and he was acquitted and discharged.

[19] Again, Zulkefli Makinuddin FCJ (now Chief Judge Malaya) in *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533; [2010] 6 CLJ 878 (FC), writing for the Federal Court held that the discrepancy in the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when they were the first recovered by the police and such discrepancy undermined the case for the prosecution. The chemist testified that the total weight of the cannabis in the two packages were 1850.21g. The investigating officer, on the other hand, testified that the total weight of the cannabis to be 1840g. These differences resulted in creating a doubt as to the identity of the cannabis and the

prosecution failed to prove the offence of trafficking against the appellant. For these reasons, the appellant succeeded in his appeal and he was acquitted and discharged forthwith.

[20] Based on these authorities, Mr Hisyam Teh Poh Teik submitted that the appellant should succeed in his appeal and his conviction and sentence be set aside.

[21] As against the argument that the High Court judge erred when he failed to recognise that there was doubt as to the identity of the drug exhibit, the learned deputy public prosecutor in the person of Pn Diar Isda Yazmin Ismail argued that there was no doubt at all as to the identity of the drug exhibit. She submitted that the drug exhibit seized by SP4 and handed over to SP7 were the same drug exhibit that was sent to SP2 for analysis. She ventured to submit that even though the store register book did not record that the drug exhibit was kept in the store after it returned from SP2, that was not a material factor that would impinge on the prosecution's case. For this proposition, she cited the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, a decision of this court, where Abdul Hamid Mohamad JCA (later the Chief Justice) delivering the majority judgment spoke of the chain of evidence in these erudite terms (see p 508 (MLJ); pp 568–569 (CLJ) of the report):

> First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc., and it is for the trafficking of that same substance that the accused is charged with.
>
> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case.

[22] Continuing on the same page (p 509 (MLJ)), His Lordship Abdul Hamid Mohamad JCA (later the Chief Justice) emphasised the point that there should be 'a reasonable explanation' emanating from the prosecution's witnesses to explain the break in the chain of evidence. This was what His Lordship said:

Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall.

[23] Here, the discrepancy in the gross weight of the drug between the evidence of SP2 and SP7 were left unexplained. SP7, as the investigating officer, did not say that the weight was an estimated weight. SP7's evidence was quite categorical when he testified that the weight of the heroin was 770g.

[24] A break or a gap in the chain of evidence is a perennial problem for the prosecution. While it shows that the prosecution's witnesses are telling the truth, the defence takes advantage of it and uses it in their favour. The only way to overcome this undue advantage is for the prosecution to advance a reasonable explanation for the break or the gap in the chain of evidence. But the non-explanation by the prosecution as to the doubts or discrepancies as to the exhibits be it in regard to their weights, description, packagings or markings must be construed as fatal (*Yeong Kia Heng lwn Pendakwa Raya*; *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322; [1992] 1 CLJ (Rep) 168(SC); *Pa v One v Public Prosecutor (No 2)* [1986] 1 MLJ 423; *Public Prosecutor v Lim Bong Kat & Anor* [1992] 3 CLJ (Rep) 380; *Public Prosecutor v Saw Kok Leong* [1993] MLJU 234; [1993] 4 CLJ 83; *Kumaraguru a/l N Muniandy & Ors v Public Prosecutor* [1994] 1 MLJ 254; *Public Prosecutor v Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196; *Public Prosecutor v Liew Oon Kiong* [1991] 3 CLJ (Rep) 593; *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480; [2001] 4 CLJ 475; *Public Prosecutor v Tan Hock Beng* [2002] MLJU 75; [2002] 3 CLJ 177; *Public Prosecutor v Sivakumar Ammasi* [2003] 6 CLJ 152; *Public Prosecutor v Poh Ah Kwang* [2003] MLJU 142; [2003] 3 AMR 664; and *Public Prosecutor v Lee Hock Lai* [2004] 1 CLJ 57).

[25] The first issue, for these reasons, should be decided in favour of the appellant.

THE SECOND ISSUE

[26] It is apparent that SP3 is not a police officer or a customs officer. He is a member of the public and, in the context of the present case, he acted as an agent provocateur. There is no legal impediment for SP3 to be appointed by SP4 as an agent provocateur. The relevant provision to refer to is s 40A of the DDA. That section enacts as follows:

Evidence of agent provocateur admissible

40A (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law or this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[27] Richard Malanjum CJ (Sabah & Sarawak) in *Hari Bhadur Ghale v Public Prosecutor* [2012] 6 MLJ 597; [2012] 7 CLJ 789 (FC), at p 607 (MLJ); p 800 (CLJ), writing for the Federal Court interpreted s 40A of the DDA in this way:

> (34) There is nothing in this first limb to suggest that it has reversed or limited the common law principle that any person can be an agent provocateur and that henceforth only a police or a customs officer can be an agent provocateur under the DDA. All it does is to highlight a situation (second situation) that even when an agent provocateur is a police or customs officer any statement, made to him by any person shall be admissible as evidence. The court has no discretion to refuse admitting (as opposed to weight) such evidence.
>
> (35) If Parliament had intended to limit the category of an agent provocateur under the DDA as argued it would have made it in plain simple term and such provision would have preceded sub-section (1) of the Section. In fact we find the words in the first limb of sub-section (2) of the section to be plain, clear and unambiguous and do not entertain any doubt for the benefit of the appellant.

[28] Yusof Abdul Rashid J explained the rationale of s 40A of the DDA in *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155 at p 157 as 'necessary in circumstances where drug trafficking has become a national issue, which may lead to national crisis'.

[29] Statutorily speaking, the agent provocateur's evidence requires no corroboration and an accused person can be convicted on the uncorroborated evidence of the agent provocateur (*Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368, at p 372; *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] CLJ (Rep) 241 (SC); and *Tee Thian See v Pendakwa Raya* [1996] 3 MLJ 209, at p 217). While acknowledging this simple proposition of the law, Mr Hisyam Teh Poh Teik

argued that SP3 could not enjoy the privilege provided for in s 40A of the DDA. According to him, the credit worthiness of SP3 as an agent provocateur is subject to the qualification that it is 'for the sole purpose of securing evidence against such person' as envisaged in s 40A(1) of the DDA. He submitted that the credit worthiness of SP3 has been compromised because SP3 was not the type of agent provocateur within the contemplation of s 40(1) of the DDA.

[30] Now, based on the evidence, it is apparent that SP3's purpose of enticing the appellant was not 'for the sole purpose of securing evidence against' the appellant, rather it was for the sole purpose of SP3 making a profit for himself. The evidence in this direction is quite overwhelming. At pp 49–50 of the appeal record, under cross-examination, SP3 confirmed that he acted as an agent provocateur for monetary gain. The exchange went like this:

Soalan : Bermakna selepas kenal Tuan Edy?

Jawab : Ya.

Soalan : Satu bulan Encik Chong punya gaji berapa?

Jawab : Tidak tentu?

Soalan : Lebih kurang?

Jawab : Sekurang-kurangnya RM1000 lebih. Bergantung kepada kes.

Soalan : Bergantung kepada kes bermakna kalau satu kes atau satu projek pada saya, ada suspek ditangkap, ada dadah bermakna Encik Chong mendapat lebih lagi, betul atau tidak?

Jawab : Bergantung kepada berat kandungan dadah.

Soalan : Kalau satu kilo Encik Chong dapat berapa?

Jawab : Tidak tahu.

Soalan : Kalau projek dapat sekilo dadah, berapa Encik Chong dapat?

Jawab : Saya tidak pasti, bergantung kepada pegawai yang bertugas, kerana itu di bawah kelolaan Bukit Aman.

Soalan : Lebih kurang berapa Encik Chong dapat sekilo?

Jawab : Saya tidak tahu, saya tidak pasti.

Soalan : Encik Chong kata Encik Chong sebagai pemberi maklumat, ada banyak projek Encik Chong berjaya, betul atau tidak?

Jawab : Ya.

Soalan : Dalam kes ini 750 gram, telah dirampas oleh pihak polis, berapa Encik Chong dapat daripada pihak polis?

Jawab : Lebih kurang dalam RM1000 hingga RM2000.

Soalan : Siapa bayar untuk kes ini?

Jawab : IPK Johor.

[31] The evidence adduced showed that SP3 not only did the spying job, so to speak, in order to secure evidence against the appellant, he also did it for financial gain.

[32] To compound the matter further, SP3 also acted as an agent provocateur to avoid being detained at the police station for a drug offence. At pp 50–51 of the appeal record, under cross-examination, this was what SP3 testified:

Soalan : Dalam tempoh 2 tahun ini, adakah Encik Chong fikir jadi anggota polis?

Jawab : Tidak ada.

Soalan : Tapi buat kerja macam polis, betul atau tidak?

Jawab : Ya.

Soalan : Encik Chong suka kerja macam ini?

Jawab : Bolehlah, bebas.

Soalan : Encik Chong pernah kena tangkap oleh pihak polis?

Jawab : Pernah.

Soalan : Bila itu?

Jawab : Tidak ingat.

Soalan : Lebih kurang tahun berapa?

Jawab : Saya tidak ingat, terlalu lama.

Soalan : Berkenaan dengan kes dadah?

Jawab : Ya.

Soalan : Apa jenis dadah itu, Encik Chong kena tangkap?

Jawab : Syabu.

Soalan : Adakah Encik Chong dituduh di Mahkamah?

Jawab : Tidak ada.

Soalan : Bila kena tangkap berkenaan dengan kes Syabu, berapa lama Encik Chong ditahan di Balai?

Jawab : Saya tidak ditahan.

Soalan : Kenapa tidak ditahan?

Jawab : Saya kemukakan syarat kepada mereka.

Soalan : Apa syarat itu Encik Chong?

Jawab : Saya berikan maklumat tokei dadah tersebut.

Soalan : Selepas itu adakah tokei itu ditangkap?

Jawab : Ada ditangkap.

[33] As a self-confessed drug addict, SP3's role as an agent provocateur cannot be categorised within the purvies of s 40A of the DDA and learned counsel implored as to disregard the evidence of SP3.

[34] Abdul Hamid Embong FCJ writing for the Federal Court in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 2 AMR 834 (FC), at p 149 (MLJ); p 844 (AMR) of the report spoke about the rebuttable presumption of credit worthiness of an agent provocateur under s 40A(1) of the DDA in this way:

> (14) This presumption of being a creditworthy witness is of course rebuttable. It falls upon the defence then to adduce sufficient evidence for the court to conclude that the evidence of an agent provocateur is unworthy of credit, (see *PP v Han Kong Juan & Ors* [1983] CLJ Rep 773).

[35] Using the case of *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* as a leverage, learned counsel for the appellant argued that the High Court judge did not analyse the evidence of SP3 with a fine toothcomb. The fact that SP3 was arrested before for a drug offence and was not charged because he negotiated with the police was not considered by the High Court in assessing the credit worthiness of SP3. Again, the fact that SP3 was indebted to the appellant in the sum of RM12,000 should have alerted the High Court judge to be wary of the evidence of SP3. It was also the case for the defence and it was put to SP3 that SP3 was the trafficker and it was SP3 who brought the drugs to the appellant's house on that fateful day and asked the appellant to repack the drugs.

[36] It must be recalled that SP3 testified that he gave two cheques to the appellant and under cross-examination at p 53 of the appeal record, SP3 testified that he discussed about the cheques as the mode of payment with SP4. But SP4 did not support SP3 on this point at all. SP3 also testified that when he spoke with the appellant, a loud speaker was activated so that SP4 could hear the conversation (see p 54 of the appeal record during the cross-examination of SP3). Yet, SP4 did not mention about the conversation with the loud speaker. In short, SP3's evidence was not corroborated by SP4 on this issue.

[37] It is salutary to say that the evidence of SP3 as an agent provocateur requires no corroboration and the appellant can be convicted on the uncorroborated evidence of SP3. But, notwithstanding s 40A of the DDA, the courts still look for some sort of corroboration. Thus, in *Public Prosecutor v Mohamed Halipah*, the High Court also found that the evidence of the agent provocateur was corroborated by Inspector Ariffin and the cautioned statement of the accused. Again, the Federal Court in *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 noted that even if the character called Cholar

was an agent provocateur, there was sufficient supportive credible evidence of the offence of trafficking. Finally, in *Public Prosecutor v Padi bin Abdullah* [1989] 2 MLJ 60, the High Court held that the evidence of the agent provocateur was amply corroborated by members of the police personnel, namely PW2, PW3 and PW6.

[38] As stipulated earlier, SP3 merely worked to gain profit. And according to learned counsel, the character of SP3 reflected his credit worthiness as an agent provocateur and it had rebutted the presumption of credit worthiness under s 40A(1) of the DDA.

[39] It was also submitted by learned counsel that the High Court judge merely accepted the evidence of SP3 at face value without subjecting it to a maximum evaluation thereby depriving the appellant of the opportunity of being acquitted (*Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 2 AMR 27 1135(SC), at p 144 (MLJ); p 1141 (AMR)).

[40] By way of a rebuttal, the learned deputy public prosecutor submitted that the High Court judge accepted the evidence of SP3 and believed the testimony of SP3. She drew our attention to the judgment of the High Court judge at p 15 of the appeal record where His Lordship said:

> Saya mendapati keterangan SP3 ini adalah 'reliable', konsisten dan tidak tergugat walaupun disoal-balas secara intensif. Saya mempercayai keterangannya.

[41] According to the learned deputy public prosecutor, SP3 gave a truthful account and was forthright when he admitted that he used to borrow money from the appellant and sought for the services of the prostitutes at the appellant's house. It was also submitted that the testimony of SP3 that he saw the appellant with an Indonesian woman putting drugs inside the Nokia box which eventually led to the discovery of the drugs, had assisted the appellant to prepare his defence. According to the learned deputy public prosecutor, SP3 could deny and not said what he had said but whatever was said by SP3 was the whole truth and there was no cover up at all. In regard to the issue of the credibility of a witness, she drew our attention to the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, where the Federal Court speaking through Eusoff Abdoolcader FJ said at pp 275–276 (MLJ); pp 113–114 (CLJ):

> The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 (at p 487). The Privy Council said in *Caldeira v Gray* [1936] MLJ 137 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved,

A are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at p 138) from the judgment of that Board in that case
B delivered by Lord Alness bears citation in extenso:

> The appellant is exercising a right of appeal which is his by right, and Their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned trial judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the
C functions of a Court of Appeal, when dealing with a questions of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.
>
> This is familiar law. It has received many illustrations — and, in particular in the
D House of Lords — the most recent of these being the case of *Powell & Wife v Streatham Manor Nursing Home* [1935] AC 243; 104 LJ KB 304; 152 LT 563; 79 SJ 179; 51 TLR 289. In that case it was held that:
>
> Where the judge at the trial has come to a conclusion upon the question which of the
E witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.

F Lord Wright, in the course of his speech, said:

> Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order
G to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'.

[42] In regard to the differences between the evidence of SP3 and SP4, she
H submitted that they were minor and she called in aid the case of *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234, where Wan Yahya J (later SCJ), at pp 235–236, aptly said:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most
I cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughtly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

> Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions. Thus the slight dissimilarity between the evidence of the complainant and his wife is explicable. It was further contended that the inconsistencies in the evidence of the complainant itself should make his story unreliable. It is true that he gave capricious accounts of certain facts but then those matters relate mostly to subsidiary issues. He was understandably vague on details on sequence of events relating to the payments but of the payments themselves and the amount paid on each occasion the witness's evidence was positive and categorical. I agree with the learned President's findings on this not only because he, having seen and heard the witness is in a better position than I am to evaluate the credibility of the witnesses, but also because I accept that no witness of truth can account for the details of events which had transpired some 17 months previously with precision.

[43] With respect, we are dealing with the evidence of an agent provocateur in the person of SP3 and the defence was merely adducing sufficient evidence by way of cross-examination of SP3 in order to establish the defence case and at the same time, to discredit SP3 and label SP3 not as a credit worthy witness bearing in mind that s 40A(1) of the DDA is rebuttable.

[44] For these varied reasons, the second issue should also be decided for the benefit of the appellant.

THE THIRD ISSUE

[45] The defence of an accused person must be considered and adequately appreciated by the trial court no matter how weak the defence is. A mere statement from the dock or a sworn testimony cannot be swept under the carpet, so to speak, or left without due consideration by the trial court. It is a grave mistake not to consider the defence and such omission is an appealable error.

[46] Snippets of the views of learned judges on this aspect of the non-consideration of the defence version will now be reproduced. In *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238(FC), Wylie CJ (Borneo) had this to say at p 239:

> As it was the only defence put forward, the position is that the defence has not been considered at all. In accordance with established principles a conviction so arrived at cannot stand. Consequently this appeal must be allowed, the conviction and sentence set aside and a new trial ordered.

[47] Ismail Khan J (later CJ Borneo) in *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, said at p 194:

> There was therefore a direct conflict of evidence and a serious defence cannot be summarily dismissed as an improbable story without adequate reasons for such a conclusion ….

[48] Shaik Daud JCA speaking for the Federal Court in *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577, aptly said at p 585:

> Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth.

[49] Dyer J in *R v Emmanuel* [1998] Crim LR 347, succinctly said at p 347:

> This may not have been a strong defence, it may have been a weak defence, but in our view that does not excuse the fact that it was not left to the jury's consideration. In all those circumstances it must follow that this conviction is unsafe and it must be quashed.

[50] Now, applying these sage words of eminent judges, the submissions advanced by learned counsel for the appellant were that the cautioned statement of the appellant marked as exh 'D21' which was tendered at the prosecution stage through SP7 represented the appellant's core defence and yet it was not considered by the High Court judge. The judgment of the High Court judge neither made any reference to nor mention the appellant's cautioned statement even though the cautioned statement was recorded two days after the arrest of the appellant. Whether the High Court judge believed or disbelieved the version of the appellant, the appellant's cautioned statement should be considered. The failure on the part of the High Court judge to consider the appellant's cautioned statement constituted a misdirection and warranted appellate intervention. It is a serious non-direction which amounts to a misdirection by the High Court judge.

[51] To recapitulate, the appellant's defence was rather simple. That SP3 was the trafficker. He was asked by SP3 to repack the drug. He had no knowledge of the contents of the plastic bag given to him by SP3. He did the packing assisted by an Indonesian woman by the name of Ina. He denied receiving the cheque from SP3 as payment for the purchase of the drug; rather that cheque was meant for repayment of a debt owed by SP3 to him.

[52] On perusal of the appeal record, there were several aspects of the appellant's defence which were corroborated by the evidence adduced by the

prosecution which were not considered by the High Court judge and they will now be considered by us. Firstly, the defence was that it was SP3 who was the trafficker. Under cross-examination at p 51 of the appeal record, it was put to SP3 that he was the trafficker. The exchange went like this:

Soalan : Adakah Encik Chong seorang penagih?

Jawab : Sebelum ini, ya.

Soalan : Berapa lama Encik Chong menjadi seorang penagih?

Jawab : Sudah lama. Kerana menjalankan tugas ini memerlukan saya menjadi seorang penagih.

Soalan : Saya katakan Encik Chong, untuk jalankan kerja seperti ini, awak juga seorang pengedar?

Jawab : Saya tidak mengedar. Tetapi saya ada mengambil.

Soalan : Adakah cerita-cerita Encik Chong ini, dirakamkan di mana-mana tempat?

Jawab : Tidak ada.

[53] Secondly, regarding the presence of SP3 in the appellant's house just before the raid, this was obliquely supported by the evidence of Syazril Haizal bin Abu Hassan ('SP6') who saw a Chinese man leaving the appellant's house. Under cross-examination, SP6 testified as follows (see p 71 of the appeal record):

Sebenarnya ada saya lihat ada satu lelaki Cina datang ke rumah OKT naik motorsikal. Saya ada nampak budak lelaki Cina itu, tapi mukanya saya tak nampak. Saya tak nampak muka budak lelaki Cina. Saya berselisih dengan lelaki Cina itu di hadapan rumah OKT, tetapi saya tak lihat lelaki Cina ada masuk ke rumah OKT.

Dalam statement, ya, saya ada kata tentang 1 lelaki Cina itu, tetapi tak sebut dia ada masuk ke dalam rumah OKT. Saya tak nampak yang lelaki Cina itu datang dan bawa 1 beg masuk.

[54] Thirdly, SP3's evidence that he was indebted to the appellant supported the version of the appellant that the cheque was given to the appellant as repayment of a debt. Under cross-examination at pp 51–52 of the appeal record, SP3 testified as follows:

Soalan : Sebenarnya Encik Chong, saya katakan yang Encik Chong pada bulan Januari, 2010, telah hutang kepada tertuduh sebanyak lebih kurang RM12,000.00?

Jawab : Ya.

Soalan : Encik Chong hutang sebab Encik Chong telah pinjam kepada tertuduh sedikit-sedikit dalam tempoh masa?

Jawab : Ya.

Soalan : Saya katakan Encik Chong, cek ini (Ekshibit P7A) sebenarnya bukanlah duit untuk membeli dadah daripada tertuduh?

Jawab : Tidak setuju.

Soalan : Saya katakan yang sebenarnya cek P7A ini adalah untuk membayar hutang kepada tertuduh?

Jawab : Tidak setuju.

[55] Fourthly, SP3's evidence that the appellant and one Indonesian woman placed the drug inside the box supported the appellant's version that the appellant only did the repacking assisted by one Indonesian woman. Again, under cross-examination, SP3 had this to say at p 52 of the appeal record:

Soalan : Tertuduh dan seorang perempuan Indon di rumah tersebut masukkan dadah ke dalam kotak, betul atau tidak?

Jawab : Ya.

[56] We have before us a serious defence put up by the appellant. It was a bounden duty of the High Court Judge to consider the defence together with the cautioned statement of the appellant. But this was not done. There was no judicial appreciation of the defence case. It is a classic case of non-direction by the High Court judge unto himself. Yet, the High Court judge labelled the defence of the appellant as a 'bare denial' and as an 'afterthought'. At p 23 of the appeal record, the High Court judge in his written grounds of judgment said:

> 'Re-packing' yang dimaksudkannya itu adalah lebih merupakan suatu pembelaan yang berupa 'bare denial' dan sengaja di 'invent'. Pembelaan yang dikemukakan itu adalah penafian semata. Pembelaan tersebut adalah terlalu lemah untuk dijadikan sebagai asas untuk melepaskannya dari tuduhan. Ia tidak meyakinkan. Ia sukar untuk dipercayai, apatah lagi untuk diterima. Penjelasannya adalah sangat meragukan, dan jauh dari mengandungi kebenaran. Ia adalah merupakan suatu Pembelaan 'after-thought'.

[57] With respect, it was an unfair criticism mounted against the defence of the appellant. It was simply against the weight of the evidence. It was, in our judgment, neither a defence of 'bare denial' nor an 'afterthought' defence. The defence of the appellant was advanced or put at the appropriate time when the prosecution witnesses gave their evidence. This was not the case where the defence was raised for the very first time at the defence stage. In fact, the defence was put or suggested to the relevant prosecution witnesses during the trial proper. That being the case, the defence of the appellant cannot be branded as a 'bare denial' or a 'recent invention' or an 'afterthought'. The need to cross-examine and to put your case across is a sound rule of law. It allows the

opposite party to explain and defend. It is a rule of law that is not confined to criminal matters but it applies, with equal force, in civil matters as well (*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639(CA); *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *AEG Carapiet v AY Derderian* AIR 1961 Cal 359; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212(FC); *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561(SC); *Browne v Dunn* (1893) 6 R 67; and *Allied Pastoral Holdings Pty Ltd v Comr of Taxation* [1983] 1 NSWLR 1, at p 23).

[58] We have reproduced, somewhere in this judgment, segments of the cross-examination of SP3 which were pertinent to show that the appellant had put across his defence. In regard to SP4, it was put across to him that the 'barang' did not belong to the appellant and that it belonged to SP3. It was also put to SP4 that the appellant told him that it was SP3 who kept the 'barang' inside the motorcar and that SP3 would come and collect it later. It was also put to SP4 that SP3 told him that the 'barang' was in fact drugs. At p 68 of the appeal record, the cross-examination of SP4 went along these lines:

> Saya tidak setuju yang masa itulah OKT kata kepada saya yang barang ini bukan miliknya.
>
> Saya tak setuju yang masa itu OKT beritahu tentang barang ini milik Ah Boi. OKT tak kata barang itu Ah Boi yang simpan dalam kereta dan kata akan datang ambil balik.
>
> Saya tak setuju yang OKT beritahu saya yang ini sebenarnya dadah.

[59] It was through SP7 that the appellant's cautioned statement was tendered and admitted. At p 77 of the appeal record, the evidence went like this:

> Saya setuju yang siapa yang tidak biasa dengan dadah, dia tak akan tahu itu dadah. Dia tidak akan tahu juga apa jenis dadah. Percakapan OKT ada dirakamkan.
>
> Peguambela:
>
> Mohon untuk rujuk kepada percakapan OKT kepada polis.
>
> Timbalan Pendakwa Raya:
>
> No objection.
>
> Ya, ini adalah percakapan OKT yang dirakam pada 27.1.2010.
>
> Peguambela:
>
> Mohon untuk dikemukakan percakapan ini sebagai ekshibit.
>
> Timbalan Pendakwa Raya:

No objection.

Mahkamah:

Ekshibit D21.

[60] Here, the High Court judge failed to consider the appellant's cautioned statement and such failure in the same context, was adversely commented by Mohd Noor Ahmad FCJ speaking for the Federal Court in *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559; [2004] 1 CLJ 521, at p 568 (MLJ); p 531 (CLJ):

> We are also satisfied that having regard to the aforesaid factors, the learned judge had failed to adequately direct his mind as to the truth of the contents of the cautioned statement, in particular the appellant's admission that he was a drug trafficker and that the drugs were found in his possession. Having admitted the cautioned statement, it was incumbent upon the learned judge to really consider on the truth or otherwise of its contents.

[61] We reiterate that the appellant's defence was supported by his own cautioned statement in exh 'D21'. The contents are similar to the defence and the High Court judge should have accepted it. In *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1, Augustine Paul JCA (later FCJ) speaking for this court observed at p 706 (MLJ); p 9 (CLJ) that:

> The fact that the defence is not a recent fabrication is supported by the contents of exh D19 which is similar to the defence advanced. It was made three days after the arrest of the accused.

[62] It is for the High Court judge to decide the appellant's case on the basis of whether there was a reasonable doubt. A perusal of the High Court judge's judgment seems to indicate that His Lordship adopted a totally different approach. His Lordship required the appellant to convince him that the appellant was telling the truth. At p 20 of the appeal record, this was what his Lordship said:

> Persoalannya sekarang, keterangan siapakah yang sebenarnya untuk lebih menyakini untuk dipercayai. Adakah keterangan SP3, SP4, SP6, SP7 dan SP8 lebih diyakini.

[63] Again, at p 21 of the appeal record, the High Court Judge said:

> Berbalik kepada soal asal, adakah keterangan dari OKT ini benar-benar dapat menyakinkan Mahkamah sehingga boleh mengenepikan kesahihan kes pihak Pendakwaan yang diputuskan 'prima facie' itu?

[64] That was certainly a wrong approach adopted by the High Court judge. It is contrary to high authority which states that the duty of the appellant, if any, is merely to raise a reasonable doubt. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, at p 171, Mohamed Azmi SCJ laid down the law in these salient words:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable dout' test, rather than to delve in the 'believable and convincing' test before applying the 'reasonable doubt' test.

[65] Had the High Court judge adopted the reasonable doubt test, His Lordship would surely come to a different conclusion.

THE CONCLUSION

[66] For these varied reasons, we unanimously allowed the appeal of the appellant. We set aside the conviction and sentence imposed by the High Court judge. We set the appellant free.

Appeal allowed.

Reported by Afiq Mohamad Noor